

# Tracking Citizens

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Israeli authorities will still be able to use military phone tracking surveillance technology in the combat against the Coronavirus – but not in a way as unbridled as the government had wished. This is the outcome of a recent [decision by the Israeli Supreme Court](#) in the case of *ACRI v. the Knesset*. The Court refrained from declaring the Law authorizing the General Secret Service to track contact persons of infected COVID-19 patients invalid, but limited the cases in which military phone tracking surveillance technology could be used, and required the government to establish clear criteria for such use.

The use of military surveillance technology as part of the arsenal of tools employed in Israel in responding to the COVID-19 pandemic has been a contentious issue almost since the beginning of the pandemic. This phone tracking technology, referred to in Israel as “the Tool”, was developed in Israel and employed by the General Secret Service (GSS) as a counter-terrorism tool. In March 2020, as the number of confirmed COVID-19 patients began to grow, the government decided to utilize the Tool for tracking those who have been in close contact with a COVID-19 positive patient, for the purpose of requiring them to isolate.

## The legal basis

The legal basis for utilizing the Tool has changed throughout the pandemic. Initially, the GSS was authorized to employ the Tool through emergency regulations, issued under Article 39 of [Basic Law: the Government](#). After the election of the 23rd

Knesset and the establishment of the Israel's 35<sup>th</sup> government, the government decided to authorize the GSS pursuant to Article 7(B)(6) of the [General Security Service Law](#), which determines that the GSS may perform “activities in any other area determined by the Government, with the approval of the Knesset Service Affairs Committee, which is designed to safeguard and promote State interests vital to the national security of the State”. A petition against the authorization was filed at the Supreme Court, which [determined](#) that Article 7(b)(6) can serve as a temporary source of authorization, but that to the extent that the GSS is to continue to be employed as part of the response to the pandemic, it must be authorized to do so through primary legislation.

Following the Supreme Court's decision, the Law was enacted, and entered into force on July 21, 2020. The Law determines that subject to conditions of necessity and to the lack of appropriate alternatives, and after considering the implications for privacy, the government may authorize the GSS to assist the Ministry of Health in conducting epidemiological investigations in the course of the COVID-19 pandemic. The authorization may be valid for renewable periods of up to 21 days, and allows the GSS to process technological information about COVID-19 patients and the individuals that were in contact with them in the 14 days prior to receiving a positive

COVID-19 test answer. This includes information about location and contacts, and the GSS may pass it to the Ministry of Health. Based on the information processed, individuals may be required to enter a 14-day isolation period. The Law determines that there will be a process of appealing a requirement to enter isolation. Individuals are required to stay isolated until the decision in the appeal is received.

The Law was set to expire on January 23, 2021. However, on December 23, 2020, the Israeli Knesset automatically dispersed following failure to pass a state budget. Accordingly, Article 38 of [Basic Law: the Knesset](#), which determines that “Any enactment due to expire during the last two months of the term of office of the outgoing Knesset or within four months after the Knesset has decided to dissolve itself or during the first three months of the term of office of the incoming Knesset shall continue in force until the expiration of the said three months” entered into force. The Law was thus automatically extended.

## The case

The petitioners against the Law argued that it violates the rights to privacy and liberty, protected by [Basic Law: Human Dignity and Liberty](#), which is a constitutional norm in Israel. They argued that the Law does not comply with the conditions of Article 8 of Basic Law: Human Dignity and Liberty (often referred to as “the Limitation Clause”), which determines that “There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required”. While the Law was enacted for a proper purpose, they argued, it was grossly disproportional. The petitions also argued that since the Law was enacted as a temporary order, the automatic extension mechanism of Article 38 of Basic Law: the Knesset does not apply to it, and that the government’s continued authorization of the GSS did not adequately take into consideration the conditions specified in the Law for authorizing the GSS.

Of the three claims made in the petitions, the Court chose to focus on the third: the manner in which the government exercised its authority under the Law. Thus, the decision did not invalidate the Law, nor did it determine that it cannot be extended pursuant to Article 38 of Basic Law: The Knesset (although the decision does state that the fact that the Law was enacted as a temporary order is relevant for determining the scope of governmental discretion). However, the Court determined that the government’s decisions to authorize the GSS were neither reasonable nor proportionate.

Chief Justice Hayut emphasized the lack of clear criteria for the authorization of the GSS. The government’s continued authorizations, she stated, was over-sweeping, and did not take into consideration developments and changes throughout the pandemic. Specifically, the government did not take into consideration the expansion of the epidemiological inquiries mechanism, the possibility of providing an alternative civic technological tracking tool, and the impact of the vaccination operation in Israel. In light of this, she determined, the continued use of the GSS’s service was subject to the establishment of a clear criteria for the conditions justifying such

use, and in any case, could only be employed if a confirmed COVID-19 patient refused to provide information regarding his contacts or whereabouts. Justices Melzer, Barak-Erez, Amit and Baron agreed with Hayut's conclusion, emphasizing a number of additional important points. The first is the inaccuracy of the Tool, which led to many people receiving mistaken messages requiring them to enter home-isolation. Approximately 40 percent of the messages received were determined upon examination to be unjustified, and attributed to the limitations of the Tool (for example, individuals in different floors or apartments of the same building were flagged as close contacts). The second is the lack of efforts by the government to invest and develop alternatives. Even Justice Solberg, who was of a minority opinion, criticized the over-sweeping manner in which the government applied its discretion.

## **Beyond Surveillance: Implications for Additional Cases**

The decision addresses the timely topic of privacy concerns associated with new technologies, and naturally raises interest in this context. However, it also highlights a number of other points that demonstrate the limitations of the law in the COVID-19 crisis. The first regards the importance of the insistence on primary legislation as the necessary means for limiting rights. Such insistence has been a major issue in Israel, and was presented as an important safeguard of rights in the COVID-19 crisis. In a [blogpost](#) published on this site, Aeyal Gross and Nir Costi question the protective value of primary legislation that accords vast emergency powers to the government. The picture unfolded in the decision regarding the manner government decisions were made in practice substantiates their claims.

The second point demonstrated is the weakness, in practice, of the alleged safeguards inserted into the Law. For example, the temporality of the GSS's authorization was presented as a safeguard, but in reality, the authorization was effectively renewed automatically by the government. In addition, the Law requires the government to authorize the GSS only if there are no alternative means, and to develop a civic technological alternative, but in practice, not enough effort was invested in developing such alternatives. The availability of GSS surveillance undermines the motivation to invest in other means.

The third point is the relevance of comparative review. Justice Barak-Erez emphasized that the Law and the sweeping, compulsory use of surveillance technology over citizens is "exceptional" in a comparative perspective. However, she also stated that the value of comparative analysis in a novel and ongoing emergency situation such as the COVID-19 pandemic is limited. She explained that countries may have different reasons for not employing surveillance, for example, technological limitations, and in any case, the reality is changing in too fast a pace to draw conclusions from a comparison made in a particular moment in time.

The decision is a welcomed reminder that even in a pandemic, not all means should be tolerated. However, it also paints a worrisome picture of the governmental

decision making process during the pandemic, and highlights the importance of judicial review in extreme situations.

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